New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

Tobacco Section
Sales Tax
July 31, 1995

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Prepaid Sales Tax on Cigarettes

The sales tax law has been amended, effective September 1, 1995, to require the prepayment of sales tax on all cigarettes held for sale or use in New York State. If you sell cigarettes, these changes will affect you and may affect your customers.

Imposition of Tax

Agents and Wholesalers

The amendment to the sales tax law requires every cigarette agent to prepay a sales tax on all cigarettes possessed for sale or use in this state on which an agent is required to affix a cigarette tax stamp. On and after September 1, 1995, the cigarette agent must prepay the sales tax on cigarettes at the same time, and in the same manner as the agent pays for the cigarette stamps purchased. However, in order to ensure the prepayment of tax on all wholesale inventory purchased before September 1, but available for sale on and after that date, there will be a special floor tax as explained below.

No prepaid sales tax is due on sales to the United States government, its agencies or instrumentalities or to, or by, a voluntary unincorporated organization of the armed forces of the United States operating a post exchange.

Floor Tax

There will be a special floor tax (prepaid sales tax) due on the inventory of stamped packages of cigarettes held for sale in this state on September 1, 1995, other than the inventory of cigarettes offered for sale to a consumer at retail. This means that the floor tax will apply to the stamped cigarette inventory of agents and wholesalers, but not to the inventory of retail sellers to the extent the inventory is held for retail sale. If agents or wholesalers also sell at the retail level, the stamped inventory held for sale at a retail location is not included in the inventory subject to the floor tax. In addition, the floor tax will apply to any unaffixed tax stamps in the possession of a stamping agent on September 1, 1995, that were issued prior to that date. The inventory necessary to ascertain [illegible] must be taken as of the close of business August 31, 1995.

The Tax Department will send the required floor tax return to all currently licensed cigarette agents and wholesalers by September 1, 1995. Any agent or wholesaler who does not receive the required return may request one by calling the Business Tax Information Center at 1 800

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972-1233. The call is toll free from anywhere in the U.S. (including Alaska and Hawaii) and Canada. All floor taxes will be due and payable to the Commissioner of Taxation and Finance on or before September 20, 1995.

Certification Requirement

The prepaid sales tax the agent pays must be passed through to each successive purchaser until the cigarettes are sold at retail to the consumer. On each sale of cigarettes that is not a sale at retail, the seller must give the purchaser a certification at the time of delivery of the cigarettes. The certification must state that the prepaid sales tax has been paid or assumed and the amount being passed through to the purchaser. In all instances where a stamping agent initially paid or assumed the prepaid tax, the certification document issued (whether by a stamping agent or wholesaler) must contain the name of the stamping agent who assumed or prepaid the tax initially. The certification can be included on either the seller's invoice or the Tax Department certificate, Form ST-133.

If the purchaser does not get the proper certification from the seller at the time of delivery of the cigarettes, both the seller and the purchaser are jointly and severally liable for the prepaid sales tax due. In the absence of the certification, it is presumed the prepaid tax has not been paid. The burden of proof that any sale is not taxable is on both the seller and the purchaser (other than the retail consumer).

Computation of the Prepaid Sales Tax

For the period September 1, 1995, through August 31, 1996, the prepaid sales tax to be passed through is computed by multiplying the *base retail price of cigarettes* by a tax rate of 7¼ (.07). The *base retail price of cigarettes* established for that period is one dollar for a pack of 10 cigarettes, two dollars for a pack of 20 cigarettes and for packs containing more than 20 cigarettes, an additional 50 cents for each additional 5 (or fewer) cigarettes per pack. Therefore, the prepaid tax due on a pack of 20 cigarettes, for example, would be 14 cents ($2 x .07). The base retail prices will be adjusted annually, as of the first day of September, starting in 1996.

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Vendors should note that the *base retail price of cigarettes* used to determine the prepaid sales tax due on a pack of cigarettes, does not replace and does not have any impact on the *basic cost of cigarettes* or the *minimum wholesale or retail sales prices* set by Article 20-A of the Tax Law. The *minimum wholesale or retail sales prices* are affected only when there is a change in either the manufacturer's selling price or the cigarette excise tax (see Publication 608, *Cigarette Dealer's Minimum Price List #18*, for additional information).

Retailers

On and after September 1, 1995, any supplier selling cigarettes to a retailer must pass the prepaid sales tax through to the retailer (and give the retailer a certification). The retailer's payment of the prepaid sales tax to the supplier does not require a change in either the retailer's retail selling price

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of the cigarettes or the amount of the retail sales tax that the retailer is required to collect from customers. When retailers sell cigarettes to their customers, they should not include the prepaid sales tax in the retail selling price of the cigarettes. They should continue to use their regular retail selling price. Sales tax is collected from the consumer based on the retailers' regular selling price multiplied by the combined state and local sales tax rate in effect for their location. When the retailers file their sales and use tax returns, the sales tax liability is computed based on their selling price and the applicable tax rate. The prepaid sales tax is then deducted from the sales tax due on all the retailers' sales including the sales of the cigarettes.

Example: John Jones operates a small neighborhood grocery store in upstate New York where the combined state and local sales tax rate is 8%. He sells a number of standard brands of cigarettes for $2.50 per pack. He has been buying cigarettes from an agent who charges him $18.00 a carton. For each carton of cigarettes he buys after September 1, 1995, the agent will charge him an additional $1.40 per carton to cover the prepaid tax. Mr. Jones would compute the sales tax on the cigarettes and the total tax due before and after September 1 as follows:

Sales before September 1, 1995

(Jones's cost for cigarettes $1.80 per pack)

Selling price of cigarettes	$2.50
Times tax rate (8%)	X .08
Tax due from customer per pack	$.20

Cigarettes sold in the quarter ending August 31, 1995

3,000 packs X $2.50 per pack =	$7,500
State and local tax (8%)	.08
Total tax due on cigarettes to be paid with return	$600

Sales after September 1, 1995

(Jones's cost for cigarettes $1.94 per pack • price includes $.14 prepaid tax per pack)

Selling price of cigarettes	$2.50
Times tax rate (8%)	X .08
Tax due from customer per pack	$.20

Cigarettes sold in the quarter ending November 30, 1995

3,000 packs X $2.50 per pack =	$7,500
State and local tax (8%)	.08
Tax due before prepaid tax credit	$600
Minus prepaid tax credit*	-420
Total tax due on cigarettes to be paid with return	$180

* The prepaid sales tax credit is computed by multiplying the number of packs sold by the prepaid sales tax paid on each pack. (3,000 packs x $.14 prepaid tax per pack = $420 total credit). If Mr. Jones does not have a count of the number of packs sold during the period, he can add up the amount of prepaid tax shown on his purchase invoices during this period and take credit for that amount. Whichever method he uses, he must use that method consistently. However, if Mr. Jones finds it necessary to change his method for taking credit, he must adjust his computation of credit accordingly.

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Credit or Refund of the Prepaid Sales Tax

Vendors will be allowed a credit or refund of the prepaid tax actually paid, if:

- a retailer sells cigarettes to the consumer and collects the retail sales tax due on the sale;
- a vendor sells cigarettes to a retail purchaser from whom the vendor is not required to collect retail sales tax (e.g., an exempt organization);
- a wholesale or retail vendor takes cigarettes out of inventory for self use and pays the required compensating use tax;
- the vendor exports cigarettes for sale or use outside New York State;
- the cigarettes have been destroyed, or have become unsaleable or unfit for use; or
- the prepaid tax was paid in error.

Credits for prepaid sales tax may be claimed on Forms ST-100 and ST-102 Quarterly Returns, ST-809 and ST-810 Part-Quarterly Returns or on the ST-101 and ST-103, Annual Returns. Refunds may be applied for using Form AU 11, *Application for Credit or Refund*. Stamping agents should file Form CG-114, *Claim for Redemption/Refund of Cigarette Tax Stamps and Prepaid Sales Tax*.

Preventing Evasion of the Prepaid Sales Tax

Penalties:
All cigarettes possessed in New York State are presumed to be intended for sale or use in this state, and are therefore subject to the prepaid sales tax. The person possessing the cigarettes is responsible for paying the prepaid tax. An individual, however, may bring two cartons of cigarettes (400 cigarettes) into New York State for personal use without paying the prepaid sales tax.

Any person required to collect tax who sells cigarettes at retail and who willfully and knowingly has custody, possession or control of untaxed cigarettes (cigarettes on which no prepaid sales tax has been paid by a cigarette agent or on which no prepaid sales tax has been passed through) that were delivered on or after September 1, 1995, will be liable for a penalty equal to twice the amount of the prepaid sales tax not assumed, paid or passed through. Failure to have received at delivery of the cigarettes, the required certification of the prepaid sales tax will be considered presumptive evidence of willful knowledge of possession of untaxed cigarettes. In addition to the civil penalties imposed under Article 28 of the Tax Law, criminal penalties under Article 37 of the Tax Law may apply.

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